

the PA does not apply to these records. Appeals shall be processed under the FOIA.

(f) Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

(g) Requesters shall be advised in final responses which Act(s) was (were) used, inclusive of appeal rights.

(h) The time limits for responding to the request will be determined based on the Act cited. For example, if a requester seeks access under the FOIA for his or her personal records which are contained in a PA system of records, the time limits of the FOIA apply.

(i) Fees will be charged based on the kind of records being requested (*i.e.*, FOIA fees if agency records are requested; PA fees for requesters who are seeking access to information contained in a PA system of record which is retrieved by their name and/or personal identifier).

#### § 701.8 Processing FOIA requests.

Upon receipt of a FOIA request, DON activities shall:

(a) Review the request to ensure it meets the minimum requirements of the FOIA to be processed.

(1) *Minimum requirements of a FOIA request.* A request must be in writing; cite or imply FOIA; reasonably describe the records being sought so that a knowledgeable official of the agency can conduct a search with reasonable effort; and if fees are applicable, the requester should include a statement regarding willingness to pay all fees or those up to a specified amount or request a waiver or reduction of fees.

(2) If a request does not meet the minimum requirements of the FOIA, DON activities shall apprise the requester of the defect and assist him/her in perfecting the request.

NOTE TO PARAGRAPH (a)(2): The statutory 20 working day time limit applies upon receipt of a "perfected" FOIA request.

(b) When a requester or his/her attorney requests personally identifiable information in a record, the request may require a notarized signature or a statement certifying under the penalty of perjury that their identity is true

and correct. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

(c) *Review description of requested record(s).* (1) The FOIA requester is responsible for describing the record he/she seeks so that a knowledgeable official of the activity can locate the record with a reasonable amount of effort. In order to assist DON activities in conducting more timely searches, a requester should endeavor to provide as much identifying information as possible. When a DON activity receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined in this paragraph. DON activities are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DON activities shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the FOIA. The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non random search based on the DON activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(3) The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided solely in connection with a request for records concerning the requester, only records in Privacy Act system of records that can be retrieved by personal identifiers need be searched. However, if a DON activity has reason to believe that records on the requester may exist in a record system other than a PA system, the DON activity shall search the system under the provisions of the FOIA. In either case, DON activities may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the PA. If the records are required to be released under the FOIA, the PA does not bar its disclosure.

(4) The guidelines in paragraph (c)(3) notwithstanding, the decision of the DON activity concerning reasonableness of description must be based on the knowledge of its files. If the description enables the DON activity personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DON activity to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the staff to reasonably ascertain and locate which records are being requested.

(d) *Review request to determine if FOIA fees may be applicable.* (1) FOIA fee issues shall be resolved before a DON activity begins processing a FOIA request.

(2) FOIA fees shall be at the rates prescribed at subpart C of this part.

(3) If fees are applicable, a requester shall be apprised of what category of requester he/she has been placed and provided a complete breakout of fees to include any and all information provided before fees are assessed (e.g., first two hours of search and first 100 pages of reproduction have been provided without charge.)

(4) Forms DD 2086 (for FOIA requests) and 2086-1 (for FOIA requests for technical data) serve as an administrative record of all costs incurred to process a request; actual costs charged to a re-

quester (*i.e.*, search, review, and/or duplication and at what salary level and the actual time expended); and as input to the Annual FOIA Report. Requesters may request a copy of the applicable form to review the time and costs associated with the processing of a request.

(5) Final response letters shall address whether or not fees are applicable or have been waived. A detailed explanation of FOIA fees is provided at subpart C of this part.

(e) *Control FOIA Request.* Each FOIA request should be date stamped upon receipt; given a case number; and entered into a formal control system to track the request from receipt to response. Coordinators may wish to conspicuously stamp, label, and/or place the request into a brightly colored folder/cover sheet to ensure it receives immediate attention by the action officer.

(f) *Enter request into multitrack processing system.* When a DON activity has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing.

(1) DON activities may establish as many queues as they wish, however, at a minimum three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request: one track for simple requests, one track for complex requests, and one track for expedited processing. Determinations as to whether a request is simple or complex shall be made by each DON activity.

(2) DON activities shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing), an opportunity to limit in writing by hard copy, facsimile, or electronically the scope of the request in order to qualify for the fastest queue.

(3) This multitrack processing system does not obviate the activity's responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(4) Referred requests shall be processed according to the original date received by the initial activity and then placed in the appropriate queue.

(5) Establish a separate queue for expedited processing. A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the office which will determine whether to grant expedited access. Once the determination has been made to grant expedited processing, DON activities shall process the request as soon as practicable. Actions by DON activities to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(i) Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(ii) Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(iii) Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for

litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(iv) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(v) Other reasons that merit expedited processing by DON activities are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind. A demonstration of humanitarian need shall also be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Both of these statements must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(6) These same procedures also apply to requests for expedited processing of administrative appeals.

(g) *Respond to request within FOIA time limits.* Once an activity receives a "perfected" FOIA request, it shall inform the requester of its decision to grant or deny access to the requested records within 20 working days. Activities are not necessarily required to release records within the 20 working days, but access to releasable records should be granted promptly thereafter and the requester apprised of when he/she may expect to receive a final response to his/her request. Naturally,

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interim releases of documents are encouraged if appropriate. Sample response letters are provided on the Navy FOIA website.

(1) If a significant number of requests, or the complexity of the requests prevents a final response determination within the statutory time period, DON activities shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system. A final response determination is notification to the requester that the records are released, or will be released by a certain date, or the records are denied under the appropriate FOIA exemption(s) or the records cannot be provided for one or more of the “other reasons” (see § 701.8(n)). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination under FOIA.

(2) *Formal extension.* In those instances where a DON activity cannot respond within the 20 working day time limit, the FOIA provides for extension of initial time limits for an additional 10 working days for three specific situations: the need to search for and collect records from separate offices; the need to examine a voluminous amount of records required by the request; and the need to consult with another agency or agency component. In such instances, naval activities shall apprise requesters in writing of their inability to respond within 20 working days and advise them of their right to appeal to the appellate authority.

NOTE TO PARAGRAPH (g)(2): Formal extension letters require IDA signature.

(3) *Informal extension.* A recommended alternative to taking a formal extension is to call the requester and negotiate an informal extension of time with the requester. The advantages include the ability to agree on a mutually acceptable date to respond that exceeds a formal extension of an additional 10 working days, and the letter of confirmation does not require the signature of an IDA. Additionally, it does not impact on the additional days

the appellate authority may take when responding to a FOIA appeal.

(h) *Conduct a search for responsive records.* (1) Conduct a search for responsive records, keeping in mind a test for reasonableness (*i.e.*, file disposition requirements set forth in SECNAVINST 5212.5D, “Navy and Marine Corps Records Disposal Manual”). This includes making a manual search for records as well as an electronic search for records. Do not assume that because a document is old, it does not exist. Rather, ensure that all possible avenues are considered before making a determination that no record could be found (*i.e.*, such as determining if the record was transferred to a federal records center for holding).

(2) Requesters can appeal “adequacy of search.” To preclude unnecessary appeals, you are encouraged to detail your response letter to reflect the search undertaken so the requester understands the process. It is particularly helpful to address the records disposal requirements set forth in SECNAVINST 5212.5D, “Navy and Marine Corps Records Disposal Manual” for the records being sought.

(i) *Review documents for release.* Once documents have been located, the originator or activity having possession and control is responsible for reviewing them for release and coordinating with other activities/agencies having an interest. The following procedures should be followed:

(1) Sort documents by originator and make necessary referrals (see § 701.9).

(2) Documents for which the activity has possession and control should be reviewed for release. If the review official determines that all or part of the documents requested require denial, and the head of the activity is an IDA, he/she shall respond directly to the requester. If, however, the activity head is not an IDA, then the request, a copy of the responsive documents (unexcised), proposed redacted copy of the documents, and a detailed explanation regarding their release must be referred to the IDA for a final release determination and the requester shall be notified in writing of the transfer.

(3) Documents for which the activity does not have possession and control, but has an interest, should be referred

to the originator along with any recommendations regarding release (see § 701.9).

(j) *Process non-responsive information in responsive documents.* DON activities shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DON activities desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempted (state the appropriate exemption(s).) Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures provided. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester than even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552 (b)(1) and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(k) *Withholding/excising information.*

(1) DON records may only be withheld if they qualify for exemption under one or more of the nine FOIA exemptions/ three exclusions and it is determined that a foreseeable harm to an interest protected by those exemptions would result if the information is released. There are nine FOIA exemptions. See subpart D of this part for the scope of each exemption.

(2) Although a FOIA exemption may apply, DON activities are encouraged to consider discretionary disclosures of information when an exemption permits such disclosure (see § 701.5(f).)

(3) *Excising documents.* The excision of information within a document should be made so that the requester can readily identify the amount of information being withheld and the reason for the withholding. Accordingly, ensure that any deletion of information is bracketed and all applicable exemptions listed. In those instances, where multiple pages of documents are determined to be exempt from disclosure in their entirety, indicate the number of pages being denied and the basis for the denial.

(1) *Reasonably segregable information.* DON activities must release all "reasonably segregable information" when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

(m) *Making a discretionary disclosure.* A discretionary disclosure to one requester may preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else. The following suggested language should be included with the discretionary disclosure of any record that could be subject to withholding: "The information you requested is subject to being withheld under section (b)( ) of the FOIA. The disclosure of this material to you by the DON is discretionary and does not constitute a waiver of our

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right to claim this exemption for similar records in the future.”

(n) *Other reasons.* There are 10 reasons for not complying with a request for a record under FOIA:

(1) *No record.* The DON activity conducts a reasonable search of files and fails to identify records responsive to the request.

NOTE TO PARAGRAPH (n)(1): Requester must be advised that he/she may appeal the adequacy of search and provided appeal rights. Response letter does not require signature by IDA.

(2) *Referral.* The request is referred to another DoD/DON activity or to another executive branch agency for their action.

NOTE TO PARAGRAPH (n)(2): Referral does not need to be signed by IDA.

(3) *Request withdrawn.* The requester withdraws request.

NOTE TO PARAGRAPH (n)(3): Response letter does not require signature by IDA.

(4) *Fee-related reason.* Requester is unwilling to pay fees associated with the request; is past due in payment of fees from a previous request; or disagrees with the fee estimate.

NOTE TO PARAGRAPH (n)(4): Requester must be advised that he/she may appeal the fee estimate. Response letter does not require signature by IDA.

(5) *Records not reasonably described.* A record has not been described with sufficient particularity to enable the DON activity to locate it by conducting a reasonable search.

NOTE TO PARAGRAPH (n)(5): Response letter does not require signature by IDA.

(6) *Not a proper FOIA request for some other reason.* When the requester fails unreasonably to comply with procedural requirements, other than those fee-related issues described in paragraph (n)(4), imposed by the instruction in this part and/or other published rules or directives.

NOTE TO PARAGRAPH (n)(6): Response letter does not require signature by IDA.

(7) *Not an agency record.* When the requester is provided a response indicating that the requested information was “not an agency record” within the

meaning of the FOIA and the instruction in this part.

NOTE TO PARAGRAPH (n)(7): Response letter does not require signature by IDA.

(8) *Duplicate request.* When a request is duplicative of another request which has already been completed or currently in process from the same requester.

NOTE TO PARAGRAPH (n)(8): Response letter does not require signature by IDA.

(9) *Other (specify).* When a FOIA request cannot be processed because the requester does not comply with published rules, other than for those reasons described in paragraphs (n) (1) through (8). DON activities must document the specific discrepancy.

NOTE TO PARAGRAPH (n)(9): Response letter does not require signature by IDA.

(10) *Denial of request.* The record is denied in whole or in part in accordance with procedures set forth in 5 U.S.C. 552, DoD 5400.7-R, and the instruction in this part.

NOTE TO PARAGRAPH (n)(10): The requester is advised that he/she may appeal the determination and response letter must be signed by IDA.

(o) *Writing a response letter.* FOIA response letters should contain the following information:

(1) The date of the request; when it was received; if records were not located, where the search was conducted and what the records disposal requirements are for those records.

(2) Cut-off dates. Normally, DON activities shall consider the date of receipt of a FOIA request as the cut-off date for a records search. Where a DON activity employs a particular cut-off date, however, it should give notice of that date in the response letter to the requester.

(3) If a request is denied in whole or in part, the denial response letter should cite the exemption(s) claimed; if possible, delineate the kinds of information withheld (*i.e.*, social security numbers, date of birth, home addresses, etc.) as this may satisfy the requester and thus eliminate an appeal; provide appeal rights, and be signed by an IDA. However, there is no requirement that

the response contain the same documentation necessary for litigation (*i.e.*, FOIA requesters are not entitled to a Vaughn index (see definition in § 701.39 during the administrative process).

(4) The fees charged or waived; if fees were charged, what category was the requester placed in and provide a breakout of the fees charged (*i.e.*, the first 2 hours of search were waived and so you are being charged for the remaining 4 hours of search at \$25 per hour, or \$100; the first 100 pages of reproduction were waived and the remaining 400 pages being provided were charged at \$.15 per page, resulting in \$60 in reproduction fees, for a total of \$160). These figures are derived from Form DD 2086 (FOIA Fees) or Form DD 2086-1 (Technical Data Fees).

(5) Sample response letters are provided on the Navy FOIA website.

(p) *Press responses.* Ensure responses being made to the press are cleared through public affairs channels.

(q) *Special mail services.* DON activities are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

#### § 701.9 Referrals.

(a) The DoD/DON FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DON activity receives a request for records originated by another DoD/DON activity, it should contact the activity to determine if it also received the request, and if not, obtain concurrence to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed.

(b) While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DON activities from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DON activities should coordinate with the

originator of the information prior to making a release determination.

(c) A request received by a DON activity having no records responsive to a request shall be referred routinely to another DoD/DON activity, if the other activity has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD/DON activity, the DON activity receiving the initial request shall consult with the other DoD/DON activity to determine if that activity's association with the material is exempt. If the association is exempt, the activity receiving the initial request will protect the association and any exempt information without revealing the identity of the protected activity. The protected activity shall be responsible for submitting the justifications required in any litigation.

(d) Any DON activity receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DON activities making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number (commercial and DSN), and an e-mail address (if available).

(e) A DON activity shall refer a FOIA request for a record that it holds but was originated by another Executive Branch agency, to them for a release determination and direct response to the requester. The requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(f) A DON activity may refer a request for a record that it originated to another activity or agency when the activity or agency has a valid interest in the record, or the record was created for the use of the other agency or activity. In such situations, provide the record and a release recommendation on the record with the referral action. DON activities should include a point of contact and telephone number in the referral letter. If that organization is to respond directly to the requester, apprise the requester of the referral.